FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
NAGPUR BENCH, NAGPUR

Second Appeal No. 506/2005

Appeal	District :
Application No.	of 200
Writ petition	

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's orders

CORAM : Smt. V. A. Naik, J.
DATED : March 9, 2007.

Heard Shri Moharir for the appellant, and Shri Anthony for the respondent.

The appellant is the original defendant. A suit was filed by the respondent for recovery of possession on the basis of title. According to the plaintiff, he had purchased suit property at a public auction. The defendant was, initially, the owner of the property, but had mortgaged the same with the Cooperative Society. The defendant had challenged the sale of the property by public auction in favour of the plaintiff in an appeal before the Tahsildar. The Tahsildar dismissed the appeal on 5/1/1972. An appeal filed by the defendant against the order of the Tahsildar before the Sub Divisional Officer, also resulted in its dismissal. The defendant then challenged the said orders in appeal before the Resident Deputy Collector and finally, in revision before the Divisional Commissioner, but the defendant could not succeed. According to the plaintiff, the final order rejecting the revision filed by the defendant was passed on 28/10/1976.

The defendant had resisted the claim of the plaintiff and pleaded in the written statement that the defendant was the owner of the suit property.

The trial and the appellate Courts, after considering the evidence tendered by the parties, came to a conclusion that the plaintiff was the lawful owner of the suit property and had purchased the same in the public auction.

In view of the aforesaid findings, the Courts held that the defendant had failed to prove that the defendant was the owner of the suit property on the date of the institution of the suit. Both the Courts, therefore, concurrently held that the plaintiff was entitled to seek possession of the suit property from the defendant.

Shri Moharir, the learned counsel for the appellant, submitted that the suit filed by the plaintiff was barred by limitation as the order rejecting his revision was passed by the Divisional Commissioner on 28/10/1976 and the suit was filed by the plaintiff in the year 1991. According to the learned counsel for the appellant/defendant, the suit was clearly barred by time in view of the provisions of Article 64 of the Limitation Act, 1963 as the plaintiff had not instituted the suit within a period of 12 years from the date of passing of the order by the Divisional Commissioner on 28/10/1976. According to the appellant, the appellant/defendant had also perfected his title to the suit property by adverse possession and, therefore, the suit was clearly barred by time. According to

appellant, both the Courts had not considered the issue of limitation in its right perspective by considering the aforesaid dates and, therefore, the findings recorded by both the Courts on the issue of limitation are liable to be interfered with.

Shri Anthony, the learned counsel for the respondent, refuted the submissions made on behalf of the appellant, and submitted that the aforesaid pleas were not raised by the defendant in his written statement and, therefore, the appellant cannot be permitted to raise these pleas for the first time at the time of hearing of the second appeal for admission. The counsel for the respondent submitted that the second appeal is liable to be dismissed as no substantial question of law arises for consideration in the second appeal.

I have perused the pleadings of the parties. The plaintiff had categorically pleaded in the plaint that he became the owner of the suit property in view of the purchase of the same in a public auction. The defendant denied the aforesaid fact and claimed to be the owner of the suit property. A perusal of the written statement will make it clear that the defendant had not raised a plea of adverse possession in the written statement. The provisions of Article 64 of the Limitation Act would not apply to the facts of this case as Article 64 applies in a case where the party seeking possession was in possession of the property at an earlier point of time, and had been subsequently dispossessed. Such is not a case here. In the instant case, Article 65 would

also not be applicable as the defendant had not categorically pleaded that he has perfected his title to the suit property by adverse possession. The submissions made on behalf of the appellant to the effect that the plaintiff ought to have instituted the suit within a period of 12 years from 28/10/1976 i.e. the date of order in revision, is not supported by any plea and, therefore, cannot be considered at the stage of second appeal. Both the Courts have considered the provisions of the Limitation Act as also pleas which were actually taken by the defendant in the written statement and held that the suit was not barred by limitation.

For the aforesaid reasons, the second appeal fails. Since no substantial question of law arises for consideration in this second appeal, second appeal is dismissed with no order as to costs.

JUDGE

RMP